87-1787

No. 87-

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CITY OF LONG BEACH,
Petitioner,
VS.
SOUTHWEST AIRCRAFT SERVICES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Section 365(d)(4) of the Bankruptcy Code states that unless a lease of non-residential real property is affirmatively assumed "within 60 days after [the bankruptcy filing], or within such additional time as the court, for cause, within such 60-day period, fixes," that lease is "deemed rejected."

The question presented is:

Whether a court has the power under Section 365(d)(4) to extend the time to assume or reject a lease if the motion seeking the extension is filed before, but a hearing is not requested to be held within, 60 days after the bankruptcy filing, and the court does not act within such 60-day period to fix any additional time.

LIST OF PARTIES

Petitioner is the City of Long Beach, California; respondent is Southwest Aircraft Services, Inc.

The parties to the proceedings below were the petitioner, the City of Long Beach, respondent, Southwest Aircraft Services, Inc. and Atlantic Aviation.

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The petitioner City of Long Beach respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on October 29, 1987.

OPINIONS BELOW

The Order of the Court of Appeals for the Ninth Circuit denying rehearing is not reported. The Order, dated January 29, 1988, is printed as Appendix A hereto at p. 1a, *infra.*

The opinion of the Court of Appeals for the Ninth Circuit is reported at 831 F.2d 848, and is reprinted as Appendix B hereto at p. 2a, *infra.*

The decision of the United States Bankruptcy Appellate Panel of the Ninth Circuit is reported at 66 Bankr. 121, and is reprinted as Appendix C hereto at p. 20a, *infra.*

The decision of the United States Bankruptcy Court for the Central District of California is reported at 53 Bankr. 805, and is reprinted as Appendix D hereto at p. 24a, *infra.*

JURISDICTION

The Ninth Circuit Court of Appeals entered the judgment from which Petitioner seeks review on October 29, 1987. Thereafter, Petitioner timely sought a rehearing, and requested a rehearing *en banc.* On January 29, 1988, the Ninth Circuit denied these requests. The jurisdiction of this court to review the Ninth Circuit's judgment is invoked under 28 U.S.C. § 1254(1).

The Bankruptcy Court's jurisdiction to hear and decide the original motion derived from 28 U.S.C. § 1334(b) (providing for jurisdiction in the district courts for matters "arising in" a bankruptcy case), 28 U.S.C. § 157(a) (authorizing for the general reference of all bankruptcy matters from the district court to the bankruptcy court), General Order No. 266 of the Central District of California (providing for the general reference of all bankruptcy matters in the Central District pursuant to 28 U.S.C. § 157(a)), and 28 U.S.C. §§ 157(b)(2)(A) (matters affecting administration of the estate), (M) (orders regarding, *inter alia,* the lease of real property) and (O) (other proceedings affecting the assets of the estate).

The jurisdiction of the Bankruptcy Appellate Panel, which heard the appeal from the Bankruptcy Court, was authorized by 28 U.S.C. § 158(b)(1), and is established by the "Amended Order Establishing and Continuing the Bankruptcy Appellate Panel of the Ninth Circuit," as amended, of the Judicial Council of the Ninth Circuit, dated May 3, 1985, and by General Orders Nos. 266 and 269 of the Central District of California adopted pursuant to 28 U.S.C. § 158(b)(2). The jurisdiction of the Ninth Circuit Court of Appeals to review the decision and order of the Bankruptcy Appellate Panel derived from 28 U.S.C. § 158(d).

STATUTES INVOLVED

§ 365. Executory contracts and unexpired leases.

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

. . . .

(d) . . . .

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

STATEMENT OF THE CASE

A. Background

Southwest Aircraft Services, Inc. ("Respondent") is an aircraft maintenance company in the business of cleaning and painting airplanes. Respondent leases its business premises from the City of Long Beach ("Petitioner") under a long-term lease (the "Lease") originally entered into in June, 1971. Under the Lease, Respondent must pay Petitioner a minimum monthly rent, as well as a monthly reimbursement payment for a wash rack Petitioner constructed for Respondent's use.

Respondent did not make its March, 1985 rent payment, thus triggering a default under the Lease. On April 18, 1985, Respondent filed a voluntary petition under chapter 11 of the Bankruptcy Code and continued to operate as a debtor in possession. *See* 11 U.S.C. § 1107(a). After its filing, Respondent continued to occupy the leased premises, but did not pay rent.

Indeed, Respondent did nothing with respect to its obligations under the Lease until the 57th day after it filed its bankruptcy. On that date, Respondent filed a "Motion to Extend Time to Assume or Reject Executory Contracts and Unexpired Leases" (the "Motion"). Pursuant to Local Bankruptcy Rule 904(b) of the Central District of California (since repealed), which provided that: "[p]rior to noticing any hearing on a motion or application, counsel shall obtain telephonic or other approval of the Judge's calendar clerk as to the setting of the hearing", Respondent obtained a hearing date of July 17, 1985 — 90 days after its filing under chapter 11. The Motion asserted that Respondent was unable to decide whether to assume or reject the Lease, and thus needed a 180 day extension.

Despite ample opportunity, Respondent failed to request an *ex parte* hearing, or otherwise seek to have the Bankruptcy Court act on the Motion within the first sixty days of its bankruptcy case.[1] Thus, despite the fact that Respondent was responsible for obtaining the hearing date, it failed to attempt to schedule that hearing within the 60-day period.

B. The Motion to Extend Time in the Bankruptcy Court

At the hearing,[2] the Court ruled that the Lease had been rejected by operation of law because of Respondent's failure to comply with the "express requirements of § 365(d)(4)" which required scheduling a hearing within 60 days after commencement of the case. [53 Bankr. at 811; App. at 29a].

Justifying this result, the Court stated:

> Section 365(d)(4) represents a clear intention of Congress to protect lessors from delay and uncertainty regarding assumption and rejection of unexpired leases of non-residential real property by a trustee or debtor in possession by requiring prompt action in order to prevent the rejection of such leases.

[53 Bankr. at 810; App. at 33a]. Thus, pursuant to Section 365(d)(4), the Court found that the Lease was

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[1]As noted by the Bankruptcy Appellate Panel, the Bankruptcy Court indicated it generally granted such extensions *ex parte* before expiration of the 60 day time limit. [66 Bankr. at 122 n.2; App. at 21a n.2].

[2]As set forth in more detail in the Jurisdiction section at pages 2-3, the jurisdiction of the Bankruptcy Court was invoked under 28 U.S.C. §§ 157(b)(A), (M) and (O) and 1334(b).

rejected as a matter of law upon expiration of the 60-day period. [53 Bankr. at 807; App. at 25a]. Respondent was then required to surrender possession of the property to Petitioner.

C. The Appeal to the Bankruptcy Appellate Panel

Respondent appealed the decision of the Bankruptcy Court to the Bankruptcy Appellate Panel of the Ninth Circuit, which affirmed the Bankruptcy Court. With respect to Section 365(d)(4), the Bankruptcy Appellate Panel held that its "language is precise and leaves no room for arguing that an extension may be granted or conferred after 60 days had elapsed." [66 Bankr. at 123; App. at 23a].

D. The Appeal to the Ninth Circuit

Respondent took a further appeal to the Ninth Circuit Court of Appeals, which reversed the Bankruptcy Appellate Panel. The court held that the statutory language was not "entirely clear" and that other "plausible" readings were "possible." [831 F.2d at 849-50; App. at 5a-6a]. In light of this perceived ambiguity, the Ninth Circuit resorted to legislative history and other arguments to determine congressional intent. Believing that the result of the decisions below would be "arbitrary" and "fortuitous," the Court held that, if cause for an extension arises within the 60-day period and if a motion to extend is made within that period, a bankruptcy court may consider the debtor in possession's motion even after the 60-day period has expired. [831 F.2d at 842; App. at 8a]. It remanded the case to the bankruptcy court for further proceedings.

Judge Anderson strongly dissented. As he saw it, the ambiguity "simply did not exist." [831 F.2d at 854; App. at 16a]. He further stated that the majority's assertions

were "couched in speculation" and "without logical or authoritative support." [831 F.2d at 854 n.2; App. at 16a n.2]. He also pointed out that 60 days is not an unreasonable amount of time within which to require that a trustee or debtor in possession indicate its intent to a lessor. *Id.*

Finally, the dissent noted that the decision below attempted to re-write a clear statutory deadline, and observed that it was not the judiciary's province to "second guess the wisdom of [Congress'] choices . . ." in this regard. [831 F.2d at 856; App. at 19a]. Extension of the majority's rationale, he feared, would "lead[] to unprincipled decision making." *Id.*

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW TWISTS THE PLAIN MEANING OF SECTION 365(D)(4) IN VIOLATION OF THIS COURT'S DECISIONS REGARDING THE PROPER METHOD OF STATUTORY CONSTRUCTION

In direct contravention of prior rulings of this Court, the decision below consciously declined to construe Section 365(d)(4) of the Bankruptcy Code according to its plain meaning. In doing so, the decision effectively rewrote the statute, and will inject costly uncertainty into the administration of almost every chapter 11 bankruptcy.

A. The Reading of the Decision Below

Section 365(d)(4) governs the time in which bankruptcy debtors in possession[3] and bankruptcy trustees

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[3]Under chapter 11 of the Bankruptcy Code, a debtor may, as Respondent did, file a voluntary petition and remain in possession of

may have to decide to assume or reject[4] a non-residential lease of real property; it is thus an issue in every business bankrutpcy in which the debtor leases its business premises. Section 365(d)(4) regulates by setting deadlines. It states, in part, that "if the trustee does not assume or reject [the] unexpired lease . . . within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, ..."

In the court below, Petitioner urged that the clauses "for cause" and "within such 60-day period" each add a separate and further qualification upon a court's power to extend time under Section 365(d)(4). In brief, a court must act within 60 days of a bankruptcy *and* must find "cause" before it extends the 60-day period. The decision below as much as agreed with this reading, acknowledging that "were we to look only to the face of the statute [Petitioner's] argument would by far be the stronger one." [831 F.2d at 850; App. at 6a].

The decision below, however, did not adopt this construction. Relying instead on policy arguments and an analogy to criminal law, it held that the two clauses, although separated by commas, were to be read as one phrase. In short, it read "within such 60-day period" as modifying "for cause." Under this reading, a court may

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its assets. *See* 11 U.S.C. § 1101(1). Such a "debtor in possession" has all of the powers and privileges of a bankruptcy trustee. 11 U.S.C. § 1107(a).

[4]Assumption of a lease converts all liabilities under that lease from pre-petition obligations to post-petition administrative liabilities with priority of payment. 11 U.S.C. § 365(g)(2). In contrast, rejection of a lease constitutes material breach of that lease, with all damages related to the breach retaining their character as pre-petition damages. 11 U.S.C. § 365(g)(1).

extend the 60-day period of Section 365(d)(4) *after* it has expired; the only restriction on such an extension is that the "cause" to extend arise during the first 60 days.

B. The Decision Below Sets Forth an Untenable Canon of Statutory Construction

In addition to the adverse implications for national bankruptcy administration — discussed below at pages 17-22 — the method of statutory interpretation imposed by the court below was both novel and fundamentally at odds with this Court's decisions. As this Court has long held, "[i]n the interpretation of statutes, the function of courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." *United States v. American Trucking Ass'ns,* 310 U.S. 534, 542 (1940). Congress expresses its intent, however, through the words it chooses; it is "assume[d] that the legislative purpose is expressed by the ordinary meaning of the words used." *United States v. James,* 478 U.S. 597, ____, 106 S.Ct. 3116, 3121 (1986). "Thus, '[a]bsent a clearly expressed legislative intention to the contrary, [the] language [used] must ordinarily be regarded as conclusive.'" *American Tobacco Co. v. Patterson,* 456 U.S. 63, 68 (1982). *See also I.N.S. v. Cardoza-Fonseca,* 107 S.Ct. 1207, 1213 & n. 12 (1987). In short, as this Court has most recently stated: "The plain meaning of [a] statute decides the issue presented." *Bethesda Hospital Ass'n v. Bowen,* 108 S.Ct. 1255, ____, 56 U.S.L.W. 4279, 4280 (1988).

As the dissent below noted, the Ninth Circuit panel "ignore[d] the plain meaning and the structure of the pertinent portions of section 365(d)(4)." [831 F.2d at 854 (Anderson, J.); App. at 16a]. Using the independent clauses "for cause" and "within such 60-day period" as pieces in a statutory shell game, the decision below

observed that the reference of these clauses need not be the clause in which Congress placed them (*i.e.*, "within such additional time as the court . . . fixes"); instead, the court forced one of these embedded clauses (*i.e.*, "for cause") to modify the clause which followed it (*i.e.*, "within such 60-day period"). [831 F.2d at 850; App. at 6a]. This reading, the court asserted, was both "plausible" and "possible." *Id.*

The application of the court's "possible" construction produced different results than the application of the "stronger" reading advanced by Petitioner. As a result, the court believed this created an ambiguity[5] which permitted it to apply extraneous arguments designed to obtain a result more consistent with judicial "freedom and flexibility." *Id.*

In so stating the issue, the decision below broke new ground. Rather than stopping at the plain language interpretation Petitioner urged, the decision below used the existence of "possible" or "plausible" readings to embark — in direct contradiction of this Court's mandate that clear language be given effect — on a voyage through inconclusive legislative intent and inapposite analogies. This approach is directly contrary to *Cardoza-Fonseca,* 107 S.Ct. at 1213 n. 12, *Patterson,* 456 U.S. at 68, and other longstanding precedent of this Court. As stated, for example, in *Gemsco, Inc. v. Walling,* 324 U.S. 244, 260 (1945): "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly

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[5]As noted by the Bankruptcy Appellate Panel, the only ambiguity lies in what Congress meant by "assumption" of a lease. [66 Bankr. at 123; App. at 22a]. Since Respondent never attempted to assume the lease at issue, the issue of the scope of the term "assumption" is not presented by this case.

ambiguous significance, may furnish dubious bases for inference in every direction." *See also Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, 89 (1935) ("We are not at liberty to construe language so plain as to need no construction, or to refer to committee reports where there can be no doubt of the meaning of the words used.").

The decision below also borders on judicial usurpation of the legislative function; it attempts to rewrite Section 365(d)(4) to achieve a result different than that obtained by compromise and negotiation during the legislative process. *See Crooks v. Harrelson,* 282 U.S. 55, 60 (1930). Throughout the Bankruptcy Code — as shown below at pages 17-22 — Congress provided for a series of time deadlines as part of the balance struck for the benefits bankruptcy confers. To arbitrarily tinker with one of these deadlines, under the guise of providing judicial "freedom and flexibility", inexorably leads, as the dissent below noted, to "unprincipled decision making." [831 F.2d at 856; App. at 19a]. This cannot be condoned, and this Court should reverse the decision below.

C. The Decision Below Frustrates, Rather Than Furthers, Congressional Intent

The "unprincipled" nature of the decision below is further demonstrated by an examination of its logic. After noting its "possible" ambiguity, the decision advanced two arguments in support of its reading: that the legislative history, properly read, supported a flexible reading, [831 F.2d at 850-51; App. at 6a-10a]; and that, if enforced, the plain meaning would produce "fortuitous and inequitable" results that Congress did not anticipate or desire. [831 F.2d at 851-53; App. at 10a-13a]. Both arguments are unsound.

1. The Legislative History Demonstrates That Lessors Were to be Protected and Were to Have Certainty

The decision below reviewed the only legislative history available, consisting solely of remarks from the floor by members of Congress.[6] Such statements, however, historically have little weight in construing clear statutory text such as Section 365(d)(4). *See Railroad Comm'n of Wisc. v. Chicago, Burlington & Quincy R.R.*, 257 U.S. 563, 589 (1922). Moreover, the decision below neglected to cite to the statement of the chair of the House Judiciary Committee, who was also one of the floor managers of the bill. In explaining the bill to the House, he stated that the addition of Section 365(d)(4) was designed to "provide protections for lessors of real property. . . ." 130 CONG. REC. H7489 (daily ed. June 29, 1984) (statement of Rep. Rodino). After its review, the decision below found that "the legislative purpose and history of the section do not provide a definite answer to the question before us . . . ." [831 F. 2d at 851; App. at 7a]. It thus concluded that Congress could not possibly have intended to divest courts of the power to hear motions to extend "without clearly indicating in the legislative history its intention to do so and explaining its reasons." [831 F.2d at 851; App. at 9a]. This rationale directly conflicts with *Cardoza-*

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[6]Section 365(d)(4) was added to the Bankruptcy Code by "The Bankruptcy Amendments and Federal Judgeship Act of 1984", Pub. L. 98-353, 98 Stat. 333 (1984). The prime focus of that act was not the amendment of Section 365(d)(4); rather, Congress was concerned primarily with the constitutional shoring up of the bankruptcy court system. Subtitle C of Title III of that bill, however, contained the "Leasehold Management Bankruptcy Amendments of 1983 *[sic]*." 98 Stat. at 361. Section 361 of those amendments contained the addition of Section 365(d)(4) to the Bankruptcy Code. 98 Stat. at 363.

Fonseca's and *Patterson's* requirement to the contrary: plain meaning can only be supplemented when there is "clearly expressed legislative intention to the contrary ...." *Cardoza-Fonseca,* 107 S.Ct. at 1213 n. 12; *Patterson,* 456 U.S. at 68.

In addition, the decision below ignored another probative element of congressional intent: Congress patterned Section 365(d)(4) after Section 365(d)(1), which had been uniformly construed in a manner contrary to the decision below. *See Marks v. United States,* 161 U.S. 297, 301-04 (1896) (same language in different, but related, statutes given same construction). Under Section 365(d)(1), a chapter 7 trustee must assume, reject or move to extend the time to assume or reject all executory contracts[7] "within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, ..." 11 U.S.C. § 365(d)(1).

Congress used this same language in Section 365(d)(4). As the bankruptcy court below noted, [53 Bankr. at 809; App. at 29a-30a], before the enactment of Section 365(d)(4) courts had uniformly construed Section 365(d)(1) to require a decision by a court within the first 60 days after the order for relief. *See, e.g., In re Capellen,* 39 Bankr. 40, 40-41 (Bankr. S.D. Fla. 1984). *In re Mead,* 28 Bankr. 1000, 1002 (E.D. Pa. 1983). *See also National Labor Relations Board v. Bildisco and Bildisco,* 465 U.S. 513, 529 (1984) ("a Chapter 7 ... trustee has only 60 days from the order for relief in which to decide whether to assume or reject an executory contract.").

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[7]Section 365(d)(4) applies only to one subset of executory contracts: leases of non-residential real property. This limitation reflects congressional intent to protect lessors, *see* 130 CONG. REC. H7489 (daily ed. June 29, 1984) (statement of Rep. Rodino), and underscores the anomaly of the decision below in removing that protection.

The legislative history of Section 365(d)(1) confirms this reading. The present form of Section 365(d)(1) derives from H.R. 8200, 95th Cong., 1st Sess. (1977), which ultimately became the 1978 Bankruptcy Code. The source of Section 365(d)(1) in H.R. 8200, in turn, was Section 4-602(a)(1) of the Bankruptcy Code proposed in 1973 by the Commission on the Bankruptcy Laws of the United States. SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMM. ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, 95th Cong., 1st Sess., TABLE OF DERIVATION OF H.R. 8200, at 6 (Comm. Print 1977). Section 4-602(a)(1) read: "an executory contract . . . is rejected if the trustee does not assume it within 60 days after the date of the petition or within such further period of time, not exceeding 60 days, as the administrator may indicate by notice to the other party *given within the first 60-day period.*" REPORT OF THE COMMISSION OF THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. 137, Part II, 93rd Cong., 1st Sess. 153 (1973) (emphasis added).

Under the original form of the statute quoted above, lessors were to know within the first sixty days of a case that their lease would be assumed, rejected or that a set period of time would be given within which that decision would be made. Successive drafts of the proposed legislation added the requirement that the bankruptcy court approve the decision to extend the time; while these amendments added additional protection for lessors, they did not affect the time limits involved. *See, e.g.,* H.R. 31, 94th Cong., 1st Sess. § 4-602(a)(1) (1975); H.R. 32, 94th Cong., 1st Sess. § 4-602(a)(1) (1975); and H.R. 6, 95th Cong., 1st Sess. § 365(d)(1) (1977).

The decision below does violence to that scheme. It allows an extension *at any time* — even *after* the first sixty

days; all that need be shown is that "cause" arose during the first 60 days. This interpretation is directly contrary to congressional intent to protect lessors, and directly contrary to the original intent to have a date certain set within the first 60 days. This Court should reject it.

2. Application of the Plain Meaning of Section 365(d)(4) Does Not Yield "Fortuitous and Inequitable" Results

The decision below also justified its failure to follow the plain meaning of the statute because of what it perceived to be "fortuitous and inequitable" results of that reading. It focused on two attributes of the statute: that 60 days was too short a time for the type of decision being made; and that the consequences of non-compliance were "forfeiture" of the lease. Neither of these premises is sound.

As discussed below at pages 17-22, 60 days is not a short period, either taken alone or in the more general context of the Bankruptcy Code. To decide otherwise attributes sloth to bankruptcy judges generally, and inefficiency to bankruptcy administration in general.[8] These fears are unfounded. As the dissent below noted: "In my experience, judges at all levels are quick to respond to urgent and emergency situations. An *ex parte* emergency motion for extension of time is clearly an option open to

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[8]The decision below read constitutional implications into Section 365(d)(4)'s time limits. [831 F.2d at 853 n.6; App. at 12a-13a n.6]. Whatever these might be, it is clear that in this case the Respondent filed its motion knowing the court would not hear it until after the 60 day period. *See* page 4, *supra*. Any forfeiture, then, would be due to the Respondent's failure to seek relief sooner.

the debtor or the trustee in this situation. It simply was not done."[9] [851 F.2d at 854; App. at 17a].

Moreover, to reach its conclusion regarding perceived forfeitures, the court misread or ignored other provisions of the Bankruptcy Code, and instead relied upon an analogy to construction of deadlines used in Rule 35 of the Federal Rules of Criminal Procedure [831 F.2d at 851-52; App. at 9a-12a]. As the dissent below points out, [831 F.2d at 855; App. at 18a], this analogy is inapposite and works against the rationale of the decision below. Rule 35 made no provision for extension and Section 365(d)(4) does; and the perceived problems with Rule 35 were ultimately corrected by Congress, rather than by judicial decision. In addition, as indicated below, a trustee or debtor in possession only retains possession due to the intervention of federal law and the automatic stay imposed by the Bankruptcy Code. Rather than effect a forefeiture, Section 365(d)(4) is better read to restore state law rights unless the court acts within the prescribed period.

There is no dispute that Section 365(d)(4) can effect a rejection of a lease and restore the parties to their state law rights. That is its plain meaning. It does so, however, only as part of a balanced package of rights. Counterbalancing the time limits on the debtor in possession, for example, is the fact that a lessor operates under restrictions as well. It is precluded by the automatic stay of 11 U.S.C. § 362(a) from enforcing its state law rights and from collecting its pre-petition debts, and by the text of

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[9]Indeed, in denying Respondent's motion, the Bankruptcy Court noted that had Respondent made an *ex parte* motion within the first 60 days, it would likely have been granted. [*See* 66 Bankr. at 122 n.2; App. at 21a n.2].

11 U.S.C. § 549(a) from receiving any pre-petition unpaid rents.

In short, the Bankruptcy Code materially affects a lessor's state law rights and remedies. It is not unreasonable then to defer to Congress' decision that a lessor should know the fate of its lease within the first sixty days of the bankruptcy case, or at least the date by which that fate will be determined. The decision below, however, disrupts that balance. Contrary to congressional concern to provide special protection for lessors, *see* page 12 *supra,* it takes away that protection and replaces it with uncertainty.

If the decision below only affected Section 365(d)(4), there would be ample grounds for reversal; however, the isolated adjustment of statutory time limits portends disruption and confusion for bankruptcy administration generally. It is to that point this brief now turns.

II.

THE DECISION BELOW WILL DISRUPT THE ADMINISTRATION OF A BANKRUPTCY SYSTEM THAT DEPENDS ON QUICK AND EFFICIENT DECISION MAKING

The proper construction of Section 365(d)(4)'s statutory time limits presents a substantial issue of bankruptcy law and administration. Debtors do not resort lightly to the protection of the federal bankruptcy laws. Once invoked, however, the pace of a bankruptcy case is quick, or else the goal — financial reorganization — can be lost.

A. Time Limits Are An Integral Part of the Bankruptcy Code

In addition to Section 365(d)(4)'s time limits, several other time limits found in the Bankruptcy Code reflect this quickened pace. It is almost tautological that these limits — expressed in a set number of days rather than in units keyed to the individual needs of each debtor — have the capacity for "fortuitous and inequitable" application. This possibility, however, is more than balanced by the certainty and guidance that time limits provide. Trustees and debtors in possession know, for example, the time limits they must operate within, and, in the case of Section 365(d)(4), that they have the opportunity to extend those limits. Creditors, on the other hand, gain assurance that their interests will be addressed within a pre-defined time frame.

If the decision below is allowed to stand, however, any debtor or trustee who misses or miscalculates one of these time limits may seek to disrupt this balance by creating "plausible" or "possible" readings to avoid the consequences of its own inaction. The result will be unwarranted and enervating uncertainty for both courts and the debtor's creditors. Review by this Court is thus necessary to prevent this confusion, and to ensure the efficient administration of the federal bankruptcy system.

The structural importance of time deadlines is highlighted by three provisions of the Bankruptcy Code: Sections 108(b); 1121(d); and 362(e). Each of these sections contains time limits which bind the debtor or which require action to preserve their benefits. Under the rationale of the decision below, however, "plausible" and "possible" readings exist for each of these statutes — as well as for all other statutes containing time limits — and these strained readings could be used to defeat certainty.

Were this to occur, both court delay and uncertainty would undermine the efficacy of the bankruptcy system.

1. Section 108(b)

Section 108(b) grants a bankruptcy debtor or trustee an extension of up to 60 days to cure, among other things, contractual defaults existing on the date of the order for relief.[10] After that 60-day period, however, the section provides no relief. *Johnson v. First Nat'l Bank of Montevideo*, 719 F.2d 270 (8th Cir. 1983), *cert. denied* 465 U.S. 1012 (1984); *In re Future Growth Ent., Inc.*, 61 Bankr. 469 (Bankr. E.D. Pa. 1986).

Section 108(b)'s time limits mesh with the time limits in Section 365(d)(4). Under Section 108(b)'s terms, a trustee or debtor in possession has up to 60 additional days to cure defaults and avoid forfeitures. This corresponds to the 60 days given under Section 365(d)(4) to decide if additional time is needed to assume or reject a lease. Read together, these constitute a general 60-day period for purposes of assessment and review of the debtor's financial situation. *Cf.* 130 CONG. REC. S8895 (daily ed. June 29, 1984) (statement of Sen. Hatch) ("This permissible 60-day grace period [under § 365(d)(3)] is intended to give the trustee time to determine what lease obligations the debtor has and to locate cash to make the required payments . . . ."). If the logic of the decision below prevails, however, and no decision under Section 365(d)(4) need be made in the first 60 days, the 60-day period Congress selected begins to erode.

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[10]In relevant part, Section 108(b) reads: "if . . . an agreement fixes a period within which a debtor . . . may . . . cure a default, . . . the trustee may only . . . cure . . . before the later of — . . . (2) 60 days after the order for relief."

2. Section 1121(d)

The decision below also potentially disturbs the balance struck in plan exclusivity. Under 11 U.S.C. § 1121, a chapter 11 debtor in possession has the exclusive right for the first 120 days of a bankruptcy case to file a plan of reorganization. If, however, the debtor makes a request "within the [120-day period] and after notice and a hearing, the court may for cause . . . increase the 120-day period . . . ." 11 U.S.C. § 1121(d). Courts have required a decision to be made within the initial statutory period of 120 days, or the right of exclusivity is lost. *See, e.g., In re Perkins*, 71 Bankr. 294, 297-98 (W.D. Tenn. 1987); *In re Hawkins*, 81 Bankr. 183, 184 (Bankr. D.D.C. 1988). Thus, even with the federally created right of exclusivity, Congress created a mechanism, like that found in Section 365(d)(4), in which inaction and the passage of time removes the ability to extend the time to exercise a right.

Moreover, under the rationale of the decision below, a "plausible" reading of Section 1121(d) would allow an oral request on the 120th day, that is, "within" the 120-day period, with a hearing long after that time. While that result is not patently illogical, it is not the choice that Congress made and expressed in clear language. Under the rationale of the decision below, however, if loss of exclusivity would be "fortuitous and inequitable," it is a reading which would control.

3. Section 362(e)

Finally, the decision below conflicts directly with 11 U.S.C. § 362(e). This section provides time limits within which a court must act when a creditor holding collateral of the debtor seeks to lift the automatic stay imposed by Section 362(a). It provides that: "[t]hirty days after a request [for relief from stay by a creditor] such stay is

terminated with respect to [such creditor], unless the court, after notice and a hearing, orders such stay continued in effect . . . ." 11 U.S.C. § 362(e).

In Section 362(e), Congress provided a shorter time limit than in Section 365(d)(4), and a time limit within the control of a party other than the debtor; the time runs from the date of the *creditor's* request. Courts have given effect to the plain meaning of this statute, however, and have found the stay terminated when the court does not act within the 30 day period. *River Hills Apts. Fund v. River Hills Assocs. Ltd.* (*In re River Hills Apts. Fund*), 813 F.2d 702, 707 (5th Cir. 1987); *United States v. Marine Power & Equipment Co.* (*In re Marine Power & Equip. Co.*), 71 Bankr. 925, 929 (W.D. Wash. 1987). In short, if Section 365(d)(4) sets an unduly onerous standard, as the decision below suggests, it is a standard under which significant other sections of the Bankruptcy Code would fail as well.

These three statutes illustrate the various interests Congress provided for, and the balances Congress struck, in crafting the overall scheme of the Bankruptcy Code. One faction — creditors — were stayed from enforcing their state law rights. Congress ameliorated the stay's effect however, by requiring debtors and courts to act promptly to address creditors' legitimate interests. The enforcement mechanism chosen to police this compromise, not suprisingly, was the imposition of clearly stated time deadlines.

B. Time Limits Are Given Effect Under the Bankruptcy Code

As with any deadline, there exists a possibility that someone might not comply, and will thus suffer harm. As demonstrated above, however, the Bankruptcy Code's

clearly expressed time limits historically have been strictly construed. *See also Maressa v. A.H. Robins Co., Inc.*, 839 F.2d 220, 221 (4th Cir. 1988) ("The clear Congressional intent to require filing . . . within the established time limits precludes any exceptions based on general equitable principles"; relates to late-filed proof of claim); *In re Pigott*, 684 F.2d 239, 243-44 (3d Cir. 1982) (late filed proof of claim denied as untimely even though law firm filing claim had suspended business due to proximity in time and place to Three Mile Island nuclear accident). The decision below stands in contrast to this history of the Bankruptcy Code, and to clear congressional intent. This Court should grant the writ requested, reverse the judgment and restore the intent of Congress.

CONCLUSION

WHEREFORE, Petitioner, City of Long Beach, prays that a Writ of Certiorari issue from this Court to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Southwest Aircraft Services, Inc. v. City of Long Beach.* In the event that the petition is granted, Petitioner prays that the judgment of that court be reversed, and that the cause be remanded with directions to affirm the judgment and opinion of the Bankruptcy Appellate Panel of the Ninth Circuit.

Dated: April 28, 1988

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re SOUTHWEST AIRCRAFT SERVICES, INC.,
Debtor.
SOUTHWEST AIRCRAFT SERVICES, INC.,
Appellant,
v.
CITY OF LONG BEACH, and ATLANTIC AVIATION,
Appellees.

No. 86-6520

BAP No. CC-85-1447-AbMV
Bankr. No. LA85-05197-BR

ORDER

Filed: Jan. 29, 1988 Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: ANDERSON, SKOPIL and REINHARDT,
Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B

In re SOUTHWEST AIRCRAFT SERVICES, INC., *Debtor and Debtor-in-Possession, Debtor.*
SOUTHWEST AIRCRAFT SERVICES, INC., *Appellant,*
v.
CITY OF LONG BEACH, and Atlantic Aviation, *Appellees.*

No. 86-6520.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 10, 1987.

Decided Oct. 29, 1987.

Richard K. Diamond, Danning, Gill, Gould, Diamond & Spector, Los Angeles, Cal., for debtor-appellant.

Robert H. Shutan, Sidley & Austin, Los Angeles, Cal., for appellees.

Appeal from the United States Bankruptcy Appellate Panel for the Ninth Circuit.

Before ANDERSON, SKOPIL and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

We are asked here to resolve a question of first impression in the circuit courts regarding the interpretation of section 365(d)(4) of the Bankruptcy Code. 11 U.S.C. § 365(d)(4) (Supp.1985).[1] The Code permits a debtor in

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[1]Section 365(d)(4) provides:

Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the

bankruptcy to assume or reject any unexpired lease it may have. *Id.* § 365(a). Under section 365(d)(4), a nonresidential lease is deemed rejected by a debtor-lessee unless that party assumes the lease within 60 days after filing for Chapter 11 protection or within such additional period as is fixed by the bankruptcy court. In the case before us, the debtor-lessee moved, before the initial 60-day period had expired, for an extension of time within which to assume or reject a commercial lease, but the bankruptcy court did not hear the motion until after that period had ended. The court held that the lease was deemed rejected immediately upon the expiration of the sixtieth day, and that it was without authority to grant the timely filed motion for extension. The bankruptcy appellate panel affirmed; we reverse.

I. *Facts*

Southwest Aircraft Services, Inc., is an aircraft maintenance company located at the Long Beach Airport. Southwest leases its business premises from the City of Long Beach under a long-term lease it assumed in 1976. Several years later, commercial jet flights into the airport increased, and Long Beach leased a vacant parcel adjoining Southwest's to Atlantic Aviation, which built a jet facility on the newly leased property. Evidently the existence of the new facility resulted in a significant increase in the value of Southwest's parcel.

Southwest filed for Chapter 11 relief on April 18, 1985, and received permission to operate its business as debtor-in-possession. It then closed its pre-bankruptcy checking accounts and opened a new one in its new capacity. The March and April 1985 rent checks, which were written on

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trustee shall immediately surrender such nonresidential real property to the lessor.

an old checking account, were returned to Long Beach unpaid. After filing for Chapter 11 protection, Southwest made no further rent payments to the city.

On June 14, 57 days after filing for Chapter 11, Southwest filed a motion to extend the 60-day deadline for assuming or rejecting its lease with Long Beach. The bankruptcy court did not hear Southwest's motion until July 17, 90 days after the bankruptcy filing, and 30 days after the 60-day period had ended. At the hearing, Southwest tendered checks to Long Beach for all outstanding rent, which the city refused.

While the bankruptcy judge declared that he would be inclined to grant the extension motion, he concluded that he no longer had authority to do so, ruling that the lease was deemed rejected pursuant to section 365(d)(4) of the Bankruptcy Code. The court found that in order for a debtor-lessee to obtain an extension of time under that section, not only must that party move for an extension within 60 days of filing for Chapter 11 protection, but the court must hear and grant the motion within that period. *In re Southwest Aircraft Servs., Inc.*, 53 B.R. 805 (Bankr.C.D.Cal.1985). Under the bankruptcy judge's view, rejection was automatic since the 60-day deadline passed before he had held any hearing or issued any ruling on the motion. The Bankruptcy Appellate Panel affirmed, holding that the language of section 365(d)(4) "is precise and leaves no room for arguing that an extension may be granted or confirmed after 60 days have elapsed." *In re Southwest Aircraft Servs., Inc.*, 66 B.R. 121, 123 (Bankr. 9th Cir.1986). Southwest promptly appealed.

II. *Legal Discussion*

A. *The Proper Interpretation of Section 365(d)(4)*

The interpretation of a statute is a question of law which we review *de novo*. *E.g., United States v. Roberts*, 747 F.2d 537, 546 (9th Cir. 1984). A court's objective in interpreting a federal statute is to ascertain the intent of Congress and to give effect to its legislative will. *E.g., Philbrook v. Glodgett*, 421 U.S. 707, 713, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975). The first place a court looks in determining legislative intent is the language of the statute itself. *E.g., United States v. James*, ___ U.S. ___, 106 S.Ct. 3116, 3121, 92 L.Ed.2d 483 (1986); *Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984).

Here, the meaning of the words of section 365(d)(4) is not entirely clear. The section is not plainly susceptible to only one interpretation, and bankruptcy courts are divided on how the statute should be applied. Section 365(d)(4) provides that any unexpired nonresidential lease is deemed rejected unless the debtor-lessee assumes it "within 60 days after the date of the order for relief, *or within such additional time as the court, for cause, within such 60-day period, fixes. . . .*" 11 U.S.C. § 365(d)(4) (emphasis added). Under the section, the court's ability to extend the 60-day period is limited by a clause which includes three successive terms: "for cause," "within such 60-day period," and "fixes." It is not entirely clear whether the second term — "within such 60-day period" — modifies the term that precedes it or the term that follows it. If we read it as modifying "fixes", then a bankruptcy court would not under the literal words of the statute have the authority to grant a timely motion to extend after the sixtieth day. That is the interpretation advanced by Long Beach, as well as by some bankruptcy courts in this and other cases. *See In re House of Deals of*

Broward, Inc., 67 B.R. 23, 24 (Bankr.E.D.N.Y.1986); *In re Coastal Indus., Inc.*, 58 B.R. 48, 49 (Bankr.D.N.J. 1986); *In re Taynton Freight Sys., Inc.*, 55 B.R. 668, 671 (Bankr.M.D.Pa.1985). If, however, the 60-day term modifies "for cause," then while the cause must arise within 60 days (and implicitly the debtor must file its motion to show cause within that period), there is no express limit on when the bankruptcy court must hear and decide the motion. This more liberal reading of the statute would allow the bankruptcy courts to operate with greater freedom and flexibility. It is the one we adopt.

Several bankruptcy courts have held that the more restrictive interpretation of the statute would lead to arbitrary and fortuitous results and have rejected it for that reason. *See In re Wedtech Corp.*, 72 B.R. 464, 468 (Bankr.S.D.N.Y.1987); *In re Musikahn Corp.*, 57 B.R. 938, 942 (Bankr.E.D.N.Y.1986); *In re Unit Portions of Del., Inc.*, 53 B.R. 83, 84 (Bankr.E.D.N.Y.1985). While we recognize that were we to look only to the face of the statute Long Beach's argument would by far be the stronger one, we cannot say with certainty that it is the only plausible interpretation of section 365(d)(4). There is another possible interpretation of the statutory language, one that permits a more reasonable construction -- a construction that is more consistent with the normal concepts that govern the functioning of the judiciary. Thus, we turn to the legislative purpose and history for whatever guidance they may provide. *See, e.g., Blum v. Stenson*, 465 U.S. at 896, 104 S.Ct. at 1547.[2]

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[2]Even were the language of the section unambiguous, because the result urged by Long Beach appears so arbitrary and unfair we would still examine the legislative purpose and history in order to make certain that there was no clear indication of a contrary congressional intent. *See INS v. Cardoza-Fonseca*, ____ U.S. ____, 107 S.Ct. 1207, 1213 n. 12, 94 L.Ed.2d 434 (1987); *United States v. James*, 106 S.Ct. at

Like the language of section 365(d)(4), the legislative purpose and history of the section do not provide a definitive answer to the question before us; however, they do offer some support for Southwest's view. Before 1984, debtors in Chapter 11 reorganizations had no fixed deadline to assume or reject unexpired leases, although any party could request the court to fix a time limit. 11 U.S.C. § 365(d)(2) (1983). Congress became concerned about the practical consequences of Chapter 11 filings by tenants of shopping centers. It was particularly concerned that mall operators were facing periods of extended vacancies, that would last until such time as the bankruptcy courts would finally decide to take the initiative and force debtors to make a choice whether to assume or reject the leases. It was also concerned about the effects the extended vacancies were having on other tenants. *See* 130 Cong. Rec. S8891, S8894-95 (daily ed. June 29, 1984) (statement of Sen. Hatch), *reprinted in* 1984 U.S.Code Cong. & Admin.News 576, 590, 598-99.

To address this problem, Congress added two provisions dealing specifically with nonresidential leases in Chapter 11 proceedings. Subsection (d)(3) requires the debtor to perform all lease obligations while deciding whether to assume, but permits the court to delay the debtor's performance during the first 60 days after filing for reorganization. Subsection (d)(4) establishes the 60-day deadline for assumption or rejection, and imposes on the debtor the burden of petitioning the bankruptcy court for a change in the deadline.

According to the legislative history, the so-called Shopping Center Amendments were expressly intended to

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3121; *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n. 3, 101 S.Ct. 2239, 2241 n. 3, 68 L.Ed.2d 744 (1981); *Consumer Prod. Safety Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980).

> lessen the problems caused by extended vacancies and partial operation of tenant space by requiring that the trustee decide whether to assume or reject nonresidential real property lease [sic] within 60 days after the order for relief in a case under any chapter. This time period could be extended by the court for cause, such as in exceptional cases involving large numbers of leases.

1984 U.S.Code Cong. & Admin.News at 599. This is the sole passage in the legislative history that addresses extensions of time. The second sentence discusses the requirement that the court find "cause" for the extension; there is no reference to any requirement that the bankruptcy judge make his finding within any particular period of time. Congress' emphasis on cause for an extension, and its failure to mention any deadline within which the court must act, is fairly indicative of its intent. Congress was concerned that a properly supported motion for extension, i.e., one for good cause, should be permitted under the provision and not that the bankruptcy court should be stripped of its authority to grant an extension if it did not act within a prescribed time period.

We recognize that while the legislative history does not specifically mention that the debtor must file its motion for an extension within 60 days, such a requirement may be fairly implied in the section. It is frequently the case that if an act must be undertaken within a particular time period a request for an extension must be made before that period has expired. Such a rule can hardly be said to be unusual or worthy of special discussion in the legislative history. On the other hand, a rule that forfeits a party's rights, benefits, privileges or opportunities simply because a court fails to act within a particular time period would be quite extraordinary. We think that Congress

would not adopt any such rule without clearly indicating in the legislative history its intention to do so and explaining its reasons. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), discussed *infra,* note 6.

We, and other circuits, have previously considered whether to construe another deadline-setting provision in a manner that would deprive a court of jurisdiction to act if it failed to consider a timely filed motion within a prescribed time period. The issue was squarely presented is a series of cases involving the former version of Fed.R. Crim.P. 35 (governing reduction in sentence). One major difference was that Rule 35, unlike section 365(d)(4), was unambiguous. The rule explicitly afforded district courts only 120 days within which to act in order to reduce a sentence. Had the circuit courts given the language of the Rule its literal meaning, we would have been forced to hold that district courts had no jurisdiction to act on pending sentence reduction motions once the 120-day period had expired. However, five of the six circuits that considered the issue refused to do so.[3] This circuit was firmly in the majority.[4] Typical of the circuit

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[3]The majority view was adopted by the Third, Fourth, Fifth, Ninth and Tenth Circuits. *United States v. Johnson,* 634 F.2d 94, 97 (3d Cir. 1980); *United States v. Stollings,* 516 F.2d 1287, 1288 (4th Cir.1975); *United States v. Mendoza,* 581 F.2d 89, 90 (5th Cir.1978) (en banc) (per curiam); *United States v. DeMier,* 671 F.2d 1200, 1205 (8th Cir.1982); for Ninth Circuit cases, see note 4. The minority circuit was the Seventh. *United States v. Kajevic,* 711 F.2d 767, 768 (7th Cir.), *cert. denied,* 464 U.S. 1047, 104 S.Ct. 721, 79 L.Ed.2d 182 (1984).

[4]*E.g., United States v. Smith,* 650 F.2d 206, 209 (9th Cir.1981); *United States v. United States Dist. Court,* 509 F.2d 1352, 1356 (9th Cir.), *cert. denied,* 421 U.S. 962, 95 S.Ct. 1949, 44 L.Ed.2d 448 (1975); *Leyvas v. United States,* 371 F.2d 714, 719 (9th Cir.1967).

courts' reasoning was Chief Judge Haynsworth's analysis in his opinion for the Fourth Circuit:

> We need not give the Rule so literal a reading, however, and we can not assume that such a reading was intended when the consequences would be so devastatingly and arbitrarily fortuitous. For any number of reasons it may be impossible or impractical for a judge to act promptly upon a motion for reduction of sentence filed with the court long before the expiration of the 120 day period.

United States v. Stollings, 516 F.2d 1287, 1288 (4th Cir.1975).[5]

Similarly here, Long Beach's interpretation of section 365(d)(4) would produce arbitrary and fortuitous results. Under the city's view, a diligent debtor with an unexpired lease — oftentimes an asset critical to a successful reorganization — who moved for an extension of time immediately upon filing his petition for relief would nevertheless automatically lose the lease if the bankruptcy court failed, for whatever reason, to decide the motion within a 60-day period. Also, a debtor who diligently attempted to determine whether he could prudently assume the lease, and sought an extension only after he had determined that more time was in actuality required, might find his leasehold interest forfeited if the bankruptcy judge took even a minimal amount of time to conduct a hearing and reach a decision. The results in both instances would be manifestly unjust — and so might the result here. The bankruptcy judge said that he was inclined to the view that Southwest *had* demonstrated cause for the grant of an extension; yet, under

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[5]In 1985, Congress amended Rule 35 to conform its language to the interpretation that most circuits had given it. *See* Fed.R.Crim.P. 35, 1985 Advisory Committee Notes.

Long Beach's interpretation, the court would be unable to act, Southwest would be deprived of its place of doing business, and Long Beach might well obtain an undeserved windfall.

Bankruptcy courts, like district courts, may have numerous reasons that make it impractical or impossible for them to act within a fairly short time deadline. Construing Congress' action in adopting section 365(d)(4) as an attempt by the legislative branch to force bankruptcy courts to act at an earlier time than they would otherwise deem proper would not only result in hasty, ill-considered decisions by bankruptcy courts but might in addition exacerbate rather than alleviate the judicial backlog problem. Such an interpretation would also encourage debtors to make *pro forma* motions for extension of time before they had a full opportunity to consider whether an extension was necessary — conceivably as soon as the petition for reorganization was filed — simply to minimize the possibility that the vagaries of bankruptcy court scheduling would deny them a timely hearing. *See In re Wedtech Corp.,* 72 B.R. at 470; *In re Musikahn Corp.,* 57 B.R. at 941-42. Bankruptcy courts would then be burdened with numerous unnecessary show cause hearings. Moreover, extensions would undoubtedly be granted in cases in which, but for the restrictive interpretation of the provision, requests for extensions would not ever have been made. The cumulative effect might well be even greater delays in deciding assumption of lease issues than previously existed. In any event, Long Beach's interpretation would impose an arbitrary and unreasonable restriction on bankruptcy courts as well as work an injustice on many debtors.

Our holdings with respect to former Rule 35 are pertinent here. While in our case, unlike the Rule 35 cases, we need not reject the only possible literal reading of the

provision at issue in order to reach a reasonable result, we are nevertheless influenced in our decision by the rule announced almost one hundred years ago by the Supreme Court: "If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity." *Church of the Holy Trinity v. United States,* 143 U.S. 457, 460, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892). This is still good law today. "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." *Philbrook v. Glodgett,* 421 U.S. at 714, 95 S.Ct. at 1898 (quoting *Church of the Holy Trinity,* 143 U.S. at 459, 12 S.Ct. at 512); *see INS v. Cardoza-Fonseca,* 107 S.Ct. at 1213 n. 12; *United States v. James,* 106 S.Ct. at 3121, *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. at 108, 100 S.Ct. at 2056.

Long Beach's interpretation of section 365(d)(4) would produce fortuitous and inequitable results. It would also require us to assume that Congress intended to take the most unusual and highly questionable step of interfering with the normal operation of the judicial branch by ordering the termination of jurisdiction over a particular issue whenever a court failed to make a ruling within a brief period. In light of those circumstances, we cannot conclude that the more restrictive interpretation of the section accurately reflects the intent of Congress.[6]

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[6]There may also be constitutional obstacle to interpreting the statute in the manner Long Beach suggests. To hold that a debtor's right to his leasehold interest in a property is terminated by the bankruptcy court's failure to hear his timely motion to extend could well raise a due process question. In *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), the Supreme Court found that it was a violation of due process to terminate an individual's property interest because of an agency's failure to hear and decide a timely filed claim within a specified deadline. The Court held that, "A system or procedure that deprives persons of their

Rather, the interpretation we believe best comports with congressional intent is the one that preserves the authority of the bankruptcy court to rule on timely filed motions. It strikes the balance between creditor protection and debtor relief that Congress intended, and is eminently reasonable, fair and sensible. We fully agree with the bankruptcy courts that have previously adopted that view. *In re Wedtech, Corp.,* 72 B.R. at 469-71; *In re Musikahn Corp.,* 57 B.R. at 942; *In re Unit Portions of Del., Inc.,* 53 B.R. at 84-85.

For all the above reasons, we hold that if cause for an extension arises within the 60-day period and a motion for an extension is made within that period, a bankruptcy court may, even after the 60-day period has expired, consider the debtor's motion and, if it finds there was sufficient cause at the time the motion was filed, grant the requested extension.

B. *The Effect of Violating Section 365(d)(3)*

Long Beach makes one other argument beyond its reliance on section 365(d)(4). The city asserts that because Southwest violated section 365(d)(3), by failing to

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claims in a random manner, as is apparently true of [the statute], necessarily presents an unjustifiably high risk that meritorious claims will be terminated." 455 U.S. at 434-35, 102 S.Ct. at 1157. While here the right that Southwest would lose directly is the right to obtain an extension of time in which to decide whether to assume or reject a lease, because the failure to consider the claim before the statutory deadline effectively deprives the debtor of his leasehold interest in property the *Logan* analysis may well be applicable.

The Speedy Trial Act does not, of course, pose similar statutory or constitutional problems for at least two reasons. One, Congress made its basic intentions with respect to that Act crystal clear. Two, no individual loses any right, benefit, privilege, or opportunity as the result of any of the time restraint provisions of the Speedy Trial Act. *See* 18 U.S.C.A. §§ 3161-74 (1985).

perform its obligations under the lease after filing for Chapter 11 relief, the lease should be deemed rejected as a penalty for the violation. As the bankruptcy court noted, subsection (d)(3) does not expressly state what consequences follow from a debtor's violation of its terms. Only its companion provision, subsection (d)(4), addresses the circumstances in which a debtor's nonresidential lease is deemed rejected — and it does not include any reference to a violation of the earlier subsection. Nothing in either subsection, in any other part of the Bankruptcy Code, or in the legislative history of that Code suggests a reading such as is suggested by the city. Of the two cases Long Beach cites in support of its position, *In re Barrister of Del., Ltd.*, 49 B.R. 446 (Bankr.D.Del.1985), and *In re Condominium Admin. Servs.*, 55 B.R. 792 (Bankr. M.D.Fla.1985), the former does not hold or even suggest — directly or impliedly — that non-performance under subsection (d)(3) leads to automatic rejection, while the latter does so without citation of authority except for a wholly unsupported reference to "legislative history".

Long Beach's interpretation is a draconian one that, like its view of subsection (d)(4), would serve to deprive the court of the ability to make fair and just evaluations of the circumstances. We believe that Congress intended the bankruptcy courts to have the discretion to consider all of the particular facts and circumstances involved in each bankruptcy case and to decide whether the consequence of a violation of subsection (d)(3) should be forfeiture of the unassumed lease, some other penalty, or no penalty at all. Accordingly, we hold that the failure to make payments under subsection (d)(3) constitutes simply one element to be considered, along with all the other relevant factors, in determining whether cause exists under subsection (d)(4) to extend the 60-day period for assumption or rejection. *See In re Beker Indus. Corp.*, 64 B.R. 890, 898 (Bankr.S.D.N.Y.1986). Thus on remand the

bankruptcy court shall take Southwest's failure to make rental payments into account when it hears its motion for extension of time. However, at that time, the court should also consider the fact that Southwest tendered its past due rent at the bankruptcy court hearing on the extension motion.

III. *Conclusion*

Application of our views on the proper interpretation of sections 365(d)(3) and 365(d)(4) to this case is a straightforward matter. The bankruptcy court retains the authority to decide Southwest's motion for an extension of time. We reverse and remand so that the court may hear that motion. Southwest's failure to make proper rental payments does not require that the bankruptcy court deem the lease rejected. That failure should, however, be considered at the hearing, along with all other relevant factors, including Southwest's previous tender of all sums due.

REVERSED and REMANDED.

ANDERSON, Circuit Judge,
dissenting:

In my view, dissents should be sparing. We should strive for open-minded unanimity. In this case, try though I have, it is not possible to make that decision. Respectfully, my disagreement seems to demand a dissent from the majority opinion.

The Bankruptcy Appellate Panel was eminently correct when it observed that the language of section 365(d)(4) "is precise and leaves no room for arguing that an extension may be granted or confirmed after the 60 days has elapsed." *In re Southwest Aircraft Services, Inc.*, 66 B.R. 121, 123 (Bankr. 9th Cir.1986).

The majority attempts to find a "possible" ambiguity in order to allow more freedom and flexibility. That ambiguity simply does not exist. The majority ignores the plain meaning and the structure of the pertinent portions of section 365(d)(4). *Webster's Third International Dictionary, Unabridged,* 1978, defines "within" in several different ways: "on the inside or the inner side," "internally," "inside the bounds of a place or region," and "used as a function word to indicate enclosure or containment." In any definition of the word, in any application, there is not the slightest hint that something within the parameters of containment can also, at the same time, be "without."[1]

The majority complains that 60 days is a short period of time to act and uses that as a reason for creating an exception or extension that clearly was not contemplated by Congress. The assertion is also made that a plain reading renders the section harsh and inequitable.[2]

Sixty days is really not that short. It is six times longer than that fixed to take a criminal appeal. It is twice as long as that fixed for taking a civil appeal. It is one-sixth of a year. Significant and important decisions are often made in those time frames. It may be safely assumed that debtors, their lawyers and accountants are familiar with this time frame and have (or should have) already as-

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[1]There are numerous cases in state and federal courts dealing with the use of the word "within" in a variety of statutory situations. Most, if not all, hold that the word "within" connotes the limit beyond which action may not be taken. *See, e.g., Davies v. Miller,* 130 U.S. 284, 288-89, 9 S.Ct. 560, 561-62, 32 L.Ed. 932 (1889); *In re Keller,* 120 F.Supp. 274, 275 (N.D.Cal.1954); *Chatlos v. Overstreet,* 124 So.2d 1, 3 (Fla.1960); *Jensen v. Nelson,* 236 Iowa 569, 19 N.W.2d 596, 598 (1945); *In re Kruse's Estate,* 170 Kan. 429, 226 P.2d 835, 839 (1951).

[2]I see no need to address all of the assertions of the majority opinion. Most speak against themselves. They are couched in speculation and are without logical or authoritative support.

sessed the pros and cons of accepting or rejecting a nonresidential lease prior to filing a bankruptcy petition so that they may act or advise the trustee.

In my exerience, judges at all levels are quick to respond to urgent and emergency situations. An ex parte emergency motion for extension of time is clearly an option open to the debtor or the trustee in this situation. It simply was not done.

While the majority does mention and pay some lip service to the legislative history concerning the problems Congress was addressing, it fails to acknowledge that Congress, as it has the undoubted power to do, was attempting to correct a "harsh" and "inequitable" situation that was perceived as chaotic for lessors of nonresidential properties. The plain and intended meaning of section 365(d)(4) is also supported by this same legislative history. As pointed out by the bankruptcy judge in *In re Bernard,* 69 B.R. 13, 14 (Bankr.Ha.1986):

> The legislative history of § 365(d)(4) shows that it was the result of heavy lobbying by the [sic] lessors. Previous to the enactment of the 1984 statute, the lessors were often frustrated by the long delay in regaining possession of their property from the debtors-lessees. As a result, many leased premises were often times left vacant while the debtors-lessees delayed in determining whether to assume or reject a lease.

The purpose of the section was clearly intended to provide protection to lessors by requiring the trustee or debtor in possession to make prompt decisions (if not already made) to either assume, reject, or to file to extend the period in which the debtor or trustee must do one or the other. The majority decision is unsupported and unsupportable. "The Court would truly be gazing with a

jaundiced eye were it to perceive some ambiguity within § 365(d)(4)." *In re Coastal Industries, Inc.*, 58 B.R. 48, 50 (Bankr.D.N.J.1986).

It may be trite, but underlying most trite expressions there is a vast well of human experience. Harshness or inequity is all too often in the mind and eye of the beholder. Or, as my livestockman grandfather used to say, "It just depends on whose ox is being gored!"

This statute clearly and positively demands a *fixing* of additional time within the sixty-day time frame, and that requirement was not satisfied.

The majority opinion relies on a line of cases interpreting former Rule 35, Fed.R.Crim.P. Whatever else may be said for that line of authority as support for the majority conclusion, it should be noted that Congress corrected the problem. That is the avenue of relief to be pursued in this case. Additionally, it is significant to point out that former Rule 35 contained no provision for an extension of time. Section 365(d)(4) does have that safety valve. Research fails to disclose any cases upsetting similar deadline setting rules. This leads me to believe that such judicial determinations are the exception rather than the rule justifying the assertion of a power to do so. As was stated by the Supreme Court in *Crooks v. Harrelson*, 282 U.S. 55, 60, 51 S.Ct. 49, 75 L.Ed. 156 (1930):

> Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection

> in order to avoid usurpation of the latter. [cite omitted]. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts.

The reasons were sufficient to persuade Congress to act. We do not sit to second-guess the wisdom of their choices and "the course Congress has set." *Heckler v. Turner,* 470 U.S. 184, 212, 105 S.Ct. 1138, 1153, 84 L.Ed.2d 138 (1985).

We should affirm the Bankruptcy Appellate Panel. In my view, the majority opinion leads to unprincipled decision making.

APPENDIX C

In re SOUTHWEST AIRCRAFT SERVICES, INC., *Debtor.*

SOUTHWEST AIRCRAFT SERVICES, *Appellant,*

v.

CITY OF LONG BEACH, and Atlantic Aviation, *Appellees.*

BAP No. CC-85-1447-AbMV.
Bankruptcy No. LA85-05197-BR.

United States Bankruptcy Appellate Panels of the Ninth Circuit.

Argued May 20, 1986.

Decided Sept. 29, 1986.

Richard K. Diamond, Danning, Gill, Gould, Joseph & Diamond, Los Angeles, Cal., for appellant.

Robert H. Shutan, Sidley & Austin, Los Angeles, Cal., for appellees.

Before ABRAHAMS, MEYERS and VOLINN, Bankruptcy Judges.

OPINION

ABRAHAMS, Bankruptcy Judge.

On the 57th day after filing a Chapter 11 case, the debtor moved to extend the time for assumption or rejection of a lease of nonresidential real property. The motion was heard 90 days after the case was filed. The Bankruptcy Judge ruled that under 11 U.S.C. section 365(d)(4) an extention could not be granted because more than 60 days had passed after the case was filed. 53 B.R. 805. He deemed the lease rejected. We affirm.

Southwest Aircraft Services, Inc. is the debtor and appellant. It was the tenant under a ten-year lease on

certain nonresidential real property from the City of Long Beach. The debtor filed its Chapter 11 petition on April 19, 1985. Fifty-seven days later, it moved for an extension of the 60 day time limit for assumption or rejection of the lease under 11 U.S.C. section 365(d)(4).[1] The debtor did not seek an expedited hearing or a short *ex parte* extension of the 60 day time limit pending the hearing.[2] The Bankruptcy Judge reasoned that, according to the plain meaning of the section, extensions can only be granted within the 60 day period and that the time to assume had therefore expired. He therefore deemed the lease rejected.

Because we are asked to interpret Bankruptcy Code subsection 365(d)(4), we review the decision *de novo* as a matter of law. *In re American Mariner,* 734 F.2d 426, 429 (9th Cir.1984).

The cases are divided as to the precise steps a trustee or debtor must take to preserve a nonresidential real property lease within the 60 day deadline set by section 365(d)(4). Many of the decisions impose a strict rule whereby leases are automatically deemed rejected on the

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[1]"Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60 day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor." 11 U.S.C. § 365(d)(4) (amended 1984). In a Chapter 11 case a debtor in possession may generally exercise the powers of a trustee. 11 U.S.C. § 1107(a).

[2]The Bankruptcy Judge stated at the hearing that he generally granted emergency *ex parte* applications for extensions before expiration of the 60 day time limit. Exhibit A to Appellant's Opening Brief, page 3, line 23 to page 4, line 1.

60th day after the filing of the petition, absent a direct court order authorizing assumption.

In re By-Rite Distributing, Inc., 47 B.R. 660 (Bankr.D.Utah 1985) ("*By-Rite I*"); *In re House of Emeralds*, 57 B.R. 31, 35 (Bankr.D. Haw.1985); *Matter of Haute Cuisine, Inc.*, 57 B.R. 200, 202-03 (Bankr.M.D.Fla.1986); *In re BSL Operating Corp.*, 57 B.R. 945, 951 (Bankr.S.D.N.Y.1986); *In re Bygaph, Inc.*, 56 B.R. 596, 601 (Bankr.S.D.N.Y.1986). In contrast some courts have held that so long as the trustee or debtor takes affirmative action to assume the unexpired lease within the statutory time limit, the right to assume the lease is preserved. *In re Bon Ton Restaurant and Pastry Shop, Inc.*, 52 B.R. 850 (Bankr.N.D.Ill.1985); *In re By-Rite Distributing, Inc.* 55 B.R. 740 (D.Utah 1985) (Jenkins, C.J.) (overruling *By-Rite I* as to strict 60 day rule for assuming leases); *In re Re-Trac Corp.*, 59 B.R. 251, 254-55 (Bankr.D.Minn.1986). These courts have reasoned that the acts of filing a motion to assume, noticing the lessor, and setting a hearing are adequate steps to constitute *assumption* for purposes of the 60 day deadline imposed by section 365(d)(4).

None of these cases are controlling here. The cited cases considered what acts would satisfy the requirement of *assumption* within the 60 day deadline. We are concerned with what acts the statute requires so that trustees and debtors are timely in seeking to *extend* the period for actual assumption or rejection. *See Unit Portions of Delaware*, 53 B.R. at 85-86 (only requiring trustee to request a hearing on its motion for extension and to make a *prima facie* case of his need for extension); *contra Matter of Coastal Industries, Inc.*, 58 B.R. 48 (Bankr.N.J.1986).

While there may be ambiguity in the statutory language with respect to what constitutes assumption of a lease, there is no doubt with respect to extensions of time. Section 365(d)(4) reads, "if the trustee does not assume

or reject . . . within such additional time, as *the court,* for cause, *within such 60-day period, fixes,* then such lease is deemed rejected . . . " This language is precise and leaves no room for arguing that an extension may be granted or confirmed after 60 days have elapsed.

We disagree with the reasoning of *In re Unit Portions of Delaware, Inc.,* 53 B.R. 83, 85-86 (Bankr.E.D.N.Y.1985) that this conclusion produces absurd results. The only burden on the trustee or debtor is to obtain a ruling on an extension within 60 days of filing the petition. This time may be short, but it is not absurdly so. We do not deal here with emergencies preventing a timely made motion from being heard within the 60 day period. The debtor's motion was not filed until the 57th day. In addition, there were no unusual circumstances giving rise to claims of excuse or waiver here.

The debtor contends that rejection under section 365(d)(4) does not terminate a lease. We disagree. To us, "rejection" normally implies termination of the debtor's interest. The statute is even more explicit here, however, because it adds that if the lease is deemed rejected "the trustee shall immediately surrender such nonresidential real property to the lessor." 11 U.S.C. § 365(d)(4).

For the reasons stated, we AFFIRM.

APPENDIX D

IN RE SOUTHWEST AIRCRAFT SERVICES, INC.,
a corporation, Debtor.

No. LA 85-05197 BR.

United States Bankruptcy Court, C.D. California.

Oct. 10, 1985.

Timothy B. Taylor, Brian L. Holman, Sheppard, Mullin, Richter & Hampton, Los Angeles, Cal., for Atlantic.

Richard Kohn, Hagen & Hagen, Encino, Cal., Richard K. Diamond, Special Counsel, Danning, Gill, Gould, Joseph & Diamond, Los Angeles, Cal., Jerome D. Fireman, Special Counsel, Los Angeles, Cal., for debtor.

Thomas A. Freiberg, Jr., Linda L. Northrup, Dreisen Kassoy & Freiberg, Los Angeles, Cal., Richard F. Broude, Cynthia Futter, Sidley & Austin, Los Angeles, Cal., Roger P. Freeman, Office of the City Atty. of Long Beach, Long Beach, Cal., for City of Long Beach.

Michael J. Farrell, U.S. Trustee, Los Angeles, Cal.

MEMORANDUM OF OPINION AND ORDER DEEMING LEASE REJECTED AND REQUIRING SURRENDER OF THE PREMISES TO THE LESSOR

BARRY RUSSELL, Bankruptcy Judge.

The issue before the Court is whether 11 U.S.C. § 365(d)(4) permits this Court to extend the time for a debtor in possession to assume or reject an unexpired lease of nonresidential real property where the motion to extend is filed within 60 days from the commencement of the Chapter 11 case, but the motion is heard beyond the 60 day period.

The Court concludes that pursuant to 11 U.S.C. § 365(d)(4) the lease was deemed rejected by operation of law 61 days after the case was filed, *i.e.* June 18, 1985, and since the lease has been terminated, the Court may not extend the time to assume or reject the lease.

BACKGROUND

On June 1, 1971, the City of Long Beach and Bob's Aircraft and Industrial Cleaning Co., Inc. entered into a lease for a parcel of nonresidential real property located at the Long Beach airport. On January 31, 1976, Bob's assigned the lease to Southwest Aircraft Services, Inc. Under the terms of the lease as assigned to Southwest, Southwest was required, *inter alia,* to pay the City a minimum rent of $150.00 per month or a percentage of the monthly gross receipts received by Southwest, whichever was greater. In addition, the City paid for and constructed an aircraft washrack on the premises. Under the lease, Southwest was required to make monthly payments to the City to pay for the washrack. Southwest paid the amounts due under the lease through February, 1985, but did not make the March, 1985 payment.

On April 18, 1985, Southwest filed this Chapter 11 case and has continued its business of refurbishing airplanes as debtor in possession pursuant to 11 U.S.C. § 1107. On June 14, 1985, 57 days after the petition was filed, Southwest filed its "Motion to Extend Time to Assume or Reject Executory Contracts and Unexpired Leases" in which it sought to extend the time in which it had to assume or reject the lease pursuant to 11 U.S.C. § 365(d)(4). The City opposed the motion on the basis that pursuant to the express terms of § 365(d)(4) the extension had to have been granted within 60 days of the filing of the case, *i.e.* June 17; and since it was not, the lease was deemed rejected. The City also argued that

Southwest did not comply with § 365(d)(3) because it failed to make the monthly post-petition payments and to cure these post-petition defaults within 60 days after the filing of the case.

The motion was heard before this Court on July 17, 1985, 90 days after this case was filed. This Court orally ruled that because the time to assume or reject had not been extended within the 60 day period pursuant to § 365(d)(4) and the lease had not been assumed within the same period, the lease was deemed rejected. At the hearing, Southwest tendered a $2,900.00 cashier's check to the City to cure all the default under the lease. The City refused the offer since it was outside the 60 day period under § 365(d)(3).

On August 5, 1985, Southwest filed a Motion for Reconsideration and for the first time argued that somehow any rejection of the lease by Southwest as debtor in possession did not terminate the lease, but rather the lease was merely abandoned to Southwest the debtor, and therefore revested in Southwest the debtor. Southwest also argued for the first time that the rejection of the lease constituted a forfeiture which could not be accomplished without compliance with California law. Southwest also requested that it remain in posession for at least 90 days in order to remove a large amount of equipment from the premises.

The Motion for Reconsideration was heard by this Court on August 27, 1985. At the hearing, Southwest argued for the first time that the Court could not order Southwest to surrender possession of the premises to the City of Long Beach because Bob's (assignor of the lease to Southwest) was a necessary party due to an alleged reversionary interest in the lease. Although this Court was highly skeptical of this last minute claim, the hearing

was continued to September 9, 1985 to allow Southwest time to substantiate its claim.

At the September 9, 1985 hearing this Court concluded that all of Southwest's arguments were totally without merit and orally ruled that Southwest would be required pursuant to § 365(d)(4) to turn over immediate possession of the premises to the City, and that Southwest would have until November 5, 1985 to remove its property from the premises.

DISCUSSION

365(d)(3) Default by Southwest

The City argues that Southwest is barred from assuming the lease because Southwest has defaulted on its post-petition lease obligations. The facts are undisputed that Southwest did not make its post-petition monthly lease payments to the City during the 60 day period commencing with the filing of this Chapter 11 case and therefore was in violation of the express terms of 11 U.S.C. § 365(d)(3), which provides in pertinent part:

> "The trustee shall timely perform all the obligations of the debtor, except those specified in § 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The Court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, *but the time for performance shall not be extended beyond such 60 day period . . .*" (Emphasis added)

Unfortunately, § 365(d)(3) is silent regarding the consequences for non-compliance with its requirements. Nev-

ertheless, if the time for performance, *i.e.* the payment of the monthly lease obligation, may not be extended by the Court beyond the 60 day period, a strong argument may be made for the proposition that a failure to make the lease payments results in a default which may not be cured by the trustee, or in this case by the debtor in possession. Since § 365(b)(1) requires the prompt cure of all defaults in order to assume a lease, it may be argued that the lease is non-assumable and therefore should be deemed rejected due to the failure to comply with § 365(d)(3).

The answer to the § 365(d)(3) problem is less certain than the clear mandate of § 365(d)(4) which deems a lease to be rejected for failure to comply with its terms. Because the outcome of this motion is dictated by § 365(d)(4) the Court will leave the determination of the consequences of a failure to comply with § 365(d)(3) to another day.

§ 365(d)(4)

Section 365(d)(4) was added by the 1984 Amendments to the Bankruptcy Code, and provides as follows:

> "Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the Court, for cause, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor."

This subsection was intended to resolve uncertainty about leases between the parties to the lease. *In re By-Rite Distributing, Inc.*, 47 B.R. 660, 669 (D.Utah 1985).

There are two important aspects of § 365(d)(4). First, the trustee (or the debtor in possession pursuant to 11 U.S.C. § 1107) must accept or reject the lease within 60 days. Second, if the trustee or the debtor in possession wants more time in which to decide whether to accept or reject, the extension must be obtained *within* the original 60 day period. If the trustee or debtor in possession does not follow one of these two courses of action, then the lease is deemed rejected.

In the instant case, the 60 day time period ended on June 17, 1985. The debtor in possession filed the motion to extend before that date, but did not have the motion heard until July 17, 1985 — one month after the expiration of the time period. This is insufficient under the requirements of § 365(d)(4). The language of the section is very clear. An extension of the time period must be made within the original 60 days. Merely filing a motion is not the equivalent of actually being granted an extension. *In re By-Rite Distributing, Inc.*, 47 B.R. 660, 699 (D.Utah 1985). Additionally, there is no language in § 365(d)(4) that provides for tolling of the time period upon filing of the motion, or that allows the order to relate back to the filing of the motion. Thus, the trustee or debtor in possession must obtain a hearing and a decision within 60 days. Otherwise, the lease is deemed rejected. *Id.* at 669-70.

This conclusion is bolstered by the cases construing § 365(d)(1), which involves executory contracts and certain types of leases in Chapter 7 proceedings, and contains virtually the same automatic rejection language as § 365(d)(4). Hence, the interpretation of § 365(d)(1) is indicative of how § 365(d)(4) should be construed.

§ 365(d)(1) provides:

> "In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or

> unexpired lease of *residential* real property or of personal property of the debtor within 60 days after the *order of relief,* or within such additional time as the court, for cause, within such 60 day period, fixes, then such contract or lease is deemed rejected."

In *In re Capellen,* 39 B.R. 40 (S.D.Fla. 1984), a trustee in a chapter 7 case did not make a decision to assume or reject within the 60 day period, nor did he request an extension within that time. After the 60 days had elapsed, the trustee sought to extend the time period and assume the lease, curing all defaults. The Court concluded that "[t]he obvious statutory purpose [of § 365(d)(1)] is to preclude this Court from retroactively extending the time for assumption." *Id.* at 40. Accordingly, the lease was deemed rejected. *Id.* at 41. *See also, In re Mead,* 28 B.R. 1000, 1002 (D.C., E.D.Penn.1983); *In re Kors,* 22 B.R. 19, 20 (D.Vt.1982); *In re Northwood Industries, Inc.,* 25 B.R. 210, 215 (W.D.Wis.1982).

The additional mandate found in § 365(d)(4) requiring *immediate* surrender of the property to the lessor upon rejection, emphasizes the clear Congressional intent that § 365(d)(4) be strictly construed.

Southwest argues that Bankruptcy Code § 105(a) grants the Court the power to extend the time period. The same argument has been advanced against § 365(d)(1), and has been rejected. *Northwood Industries,* 25 B.R. at 215 (quoting 2 Collier on Bankruptcy ¶ 365.03 at p. 365-19 (15th ed. 1979)).

Section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate *to carry out the provisions of this title*" (emphasis added). Section 105(a) thus provides no basis for a retroactive extension of the 60 day time limit of § 365(d)(1) and § 365(d)(4), since such an extension

would defeat rather than carry out the provisions of the Bankruptcy Code. Both § 365(d)(1) and § 365(d)(4) provide for an extension if made with the 60 day period. Sections 365(d)(1) and 365(d)(4) provide, however, that at the end of 60 days a lease will be deemed rejected if no action has been taken. To allow a retroactive extension would effectively reverse the operation of § 365(d)(1) and § 365(d)(4), and would defeat their purpose. Accordingly, the court has no authority to issue an order under § 105(a) since such an order would not carry out the provisions of the Bankruptcy Code.

Southwest also argued that section 365(a) requires the court to approve any rejection of a lease, even an automatic statutory rejection. This argument is without merit. First, section 365(a) is expressly made subject to the provisions of section 365(d). Second, the Advisory Committee Note to Bankruptcy Rule 6006 (the rule which provides for a procedure for court approval of an assumption or rejection) specifically states that Rule 6006 "does not apply to the automatic rejection of contracts which are not assumed in chapter 7 liquidation cases within 60 days of the order for relief." Although this statement only refers to 365(d)(1), it is equally applicable to 365(d)(4) since the two sections are virtually identical, and 365(d)(4) was adopted after the statement was made. Accordingly, no court-approval of the automatic rejection is needed. If Rule 6006 were interpreted to require court approval, it would be in violation of 28 U.S.C. § 2075 ("... Such Rules shall not abridge, enlarge, or modify any substantive right ...").

Although the automatic rejection of 365(d)(4) is a harsh rule, it is clearly what Congress intended. The language of the statute is unequivocal. Additionally, the legislative history indicates that the purpose of 365(d)(4) is to force the trustee or debtor in possession

to make a quick decision, thereby eliminating the problem of extended vacancies. Statement of Sen. Hatch, 98th Cong. 2nd Sess., 1984 U.S.Code Cong. & Admin.News 576, 598-99. To disregard the clear language and legislative history of section 365(d)(4) and allow a decision beyond the 60 day period would nullify the principal objective of Congress, and would be beyond the court's equity powers. *In re By-Rite Distributing, Inc.*, 47 B.R. 660, 671 (D.Utah 1985).

"It is difficult to overemphasize the significance that Section 365(d)(4) will have in this and other reorganization cases. It is a time bomb that begins ticking relentlessly and irresistibly upon entry of the order for relief." *Id.* at 670. In order to remain in possession of the leased premises, the trustee or debtor in possession must either assume the lease or show cause why an extension is needed within the 60 days. Failure to do one or the other within the 60 day time period results in rejection of the lease and termination of the leasehold interest.

Rejection Under § 365(d)(4) Terminates the Lease

Southwest's argument that the rejection of the lease by Southwest as debtor in possession did not terminate the lease, but rather the lease was abandoned to Southwest the debtor, is totally without merit. Abandonment of property of the estate is governed by § 554, not by § 365. If Southwest were correct, § 365(d)(4) would result in an exercise in futility for a lessor.

By requiring that upon rejection under § 365(d)(4), "the trustee shall immediately surrender such nonresidential real property to the lessor," it is clear Congress intended that rejecting a lease terminates the lease. See also *In re Hawaii Dimension's, Inc.*, 47 B.R. 425 (D.Haw.1985); *In re Mead*, 28 B.R. 1000, 1002, (D.C.,

E.D.Penn.1983) (rejection under § 365(d)(1) terminates the lease).

Southwest's argument that the rejection of the lease constituted a forfeiture which could not be accomplished without compliance with California law is also totally without merit. Southwest cannot seriously argue in light of the Supremacy Clause that § 365(d)(4), a federal law, may be modified by California laws. Such a resort to California law would emasculate § 365(d)(4), clearly not the intent of Congress.

Entitlement of Possession of the Premises

At the August 27, 1985 hearing counsel for the first time argued that Bob's was a necessary party in that somehow its interests would be adversely affected by the turn over of the premises to the lessor (City of Long Beach). The promised authority for this position never materialized and Bob's failed to request to intervene in the hearing. Section 365(d)(4) mandates that upon the rejection of the lease that Southwest "[s]hall immediately surrender such nonresidential real property to the *lessor.*" (emphasis added)

CONCLUSION

Section 365(d)(4) represents a clear intention of Congress to protect lessors from delay and uncertainty regarding assumption and rejection of unexpired leases of nonresidential real property by trustee or debtor in possession by requiring prompt action in order to prevent the rejection of such leases. In this case, Southwest failed to comply with the express requirements of § 365(d)(4) resulting in the rejection of the lease.

Southwest must immediately surrender the leased premises to the City of Long Beach. However, the City is

to allow Southwest reasonable access to the premises through November 5, 1985 for the purpose of removing its personal property.

Southwest's request for a stay pending appeal is denied.

IT IS SO ORDERED.

No. 87-1787

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CITY OF LONG BEACH,
Petitioner,

vs.

SOUTHWEST AIRCRAFT SERVICES, INC.,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 87-1787

In The Supreme Court

OF THE

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October Term, 1987

CITY OF LONG BEACH,
Petitioner,

VS.

SOUTHWEST AIRCRAFT SERVICES, INC.,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF CASE

On June 1, 1971, the City of Long Beach ("Petitioner") and Bob's entered into a lease (hereinafter the "lease") whereby Bob's Aircraft and Industrial Cleaning Co., Inc. ("Bob's") leased certain business premises located at the Long Beach Airport for a period of twenty-five (25) years. At this time, the lease term has approximately eight (8) years remaining. In compliance with the lease's requirements, Bob's improved the premises with a concrete and asphalt-covered washrack facility for washing, stripping paint from, painting, cleaning and maintaining aircraft.

On January 31, 1976, Bob's assigned its interest in the lease to Southwest Aircraft Services, Inc. ("Respondent"). By the assignment, Respondent agreed to assume Bob's obligations under the lease. Petitioner consented to the assignment but did not release Bob's from its obligations under the lease.

Respondent's normal business activities require the spraying of various chemicals on airplanes which cannot be accomplished without some overspray travelling onto adjoining property. From 1971, when the lease was first entered into, until 1982, the adjoining property was vacant or used for purposes which would not result in injury by the overspray. In 1982, the City leased the adjoining properties to Aerolease-Long Beach and thereafter, by sublease, to Atlantic Aviation Corporation ("Atlantic") for the purpose of developing a new jet facility at the airport.

The new jet facility's operation is entirely inconsistent with the continued operation of respondent's business because of the inevitable overspray. As a result, Atlantic commenced an action seeking to enjoin Respondent from spraying airplanes on its premises and Respondent commenced two actions against Petitioner seeking damages for inverse condemnation. Not only has the change in use of the adjoining property made Respondent's business inconsistent with its new neighbors, it has also made Respondent's leasehold more valuable and the termination of the lease of significant interest to Petitioner. The termination of the lease will permit the further development of the jet facility onto Respondent's present premises. Thus, the effect of an order rejecting the lease and deeming it terminated would be to grant a considerable windfall to Petitioner which, given Respondent's continued willingness to pay all of the accrued rent under the

lease, Petitioner would not be entitled to receive but for the effect of such an order.

On April 18, 1985, Respondent commenced its Chapter 11 case by filing a voluntary petition for relief. Prior to the commencement of its Chapter 11 case, Respondent had paid the monthly rental due under the lease for the periods through and including the month of February 1985 and had tendered checks in payment of the March and April rent. However, after the commencement of the Chapter 11 case, the checks for the March and April rent were returned to Petitioner not honored because the account upon which they were issued was closed at the commencement of the case and all the funds were transferred to new accounts established in the name of the Chapter 11 estate. Respondent did not make any payments to Petitioner after the commencement of the Chapter 11 case as a result of a misunderstanding as to its obligation in this regard.

On June 14, 1985, Respondent filed its Motion to Extend Time to Assume or Reject Executory Contracts and Unexpired Leases ("Motion to Extend Time") whereby it sought to extend the time within which it could assume or reject the lease for a period of 180 days after June 17, 1985, the sixtieth day following the filing of the Chapter 11 case. A hearing on the motion was held on July 17, 1985. At that hearing, both Bob's and Respondent tendered payment of all outstanding rental payments then due under the lease. However, the City rejected these tenders. The bankruptcy court ruled that it lacked authority to grant the Motion to Extend Time after sixty days from the commencement of the Chapter 11 case even though the motion seeking such relief had been filed within that sixty day period. The Bankruptcy Appellate Panel for the Ninth Circuit affirmed this deci-

sion. However, the Ninth Circuit Court of Appeals reversed.

The Ninth Circuit Court of Appeals held that if cause to extend the time to assume or reject a lease arises within the sixty day period and a motion is made within that period, the bankruptcy court may grant the extension even after the sixty days has expired. It is this decision which Petitioner seeks to have reviewed by the grant of the present Petition for Writ of Certiorari (the "Petition").

SUMMARY OF ARGUMENT

The Petition notably fails to cite Rule 17 of the Rules of the Supreme Court. A review of the Petition makes the reason for this omission clear; none of the special and important reasons required by the Rule for granting the petition exist in this case. The decision of the Ninth Circuit Court of Appeals determined the purely procedural issue of whether a timely filed Chapter 11 trustee's or debtor-in-possession's motion to extend the time to assume or reject a lease of nonresidential real estate must be determined by the court within sixty days after the commencement of the case or, as the lower court decided, such a motion could be ruled upon by the Court, if filed within the sixty days and establishing cause for an extension arising within that time, although heard thereafter.[1]

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[1]Section 365(d)(4) provides as follows:

"Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed

The Ninth Circuit Court of Appeals decided the case as a matter of first impression and is the only Court of Appeals to have considered the issue. Thus there is no conflict between the circuits. Moreover, the only other appellate decisions interpreting the code section, which are district court decisions, are consistent with the decision below. Thus, there is not even a conflict of any appellate law at issue.

The only grounds for granting the Petition asserted by petitioner are that the Ninth Circuit Court of Appeals allegedly failed to adhere to this Court's prior decisions concerning the proper method to interpret statutes and that the circuit's new method of construction, if applied to eliminate other time frames in the Bankruptcy Code, 11 U.S.C. § 101 *et seq.,* will disrupt the administration of bankruptcy cases.

The Petitioner is wrong in these assertions. The Ninth Circuit Court of Appeals followed well established precedent in interpreting Section 365(d)(4) of the Bankruptcy Code, 11 U.S.C. § 365(d)(4). Petitioner believes that the statutory language required no interpretation and that, therefore, to resort to legislative history was inappropriate. However, the rule of strict construction it espouses is erroneous for several reasons. First, the statutory language is ambiguous and susceptible to various interpretations thus requiring resort to extrinsic sources to determine congressional intent. Second, even in the absence of any ambiguities this Court's prior precedents, both those cited by Petitioner and others, permit a court to examine legislative history as well as other sources to ascertain if the statutory language reflects the legislative purpose and intent. Finally, the legislative history, in-

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rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

cluding that to which Petitioner points, establishes that the purpose of the statute, to provide certainty to landlords while protecting the bankruptcy estate's need to investigate and preserve its assets, is carried into effect by the rule adopted below but would be frustrated by Petitioner's interpretation. The Ninth Circuit's recognition of the requirement that a motion to extend the time to assume or reject a lease must be filed and served within the sixty day period after the commencement of the case insures that the landlord will have the prompt notice of the trustee's or debtor's intent. Thus, the certainty which Congress desired, as evidenced by the legislative history, is accomplished by the interpretation of the statute adopted by the decision below.

Petitioner's attempt to broaden the scope of the decision below to effect other time limits in the Bankruptcy Code is a thinly disguised effort to make the decision of greater moment than is merited by the facts of the case, the language of the decision or the court's holdings. This slippery slope argument ignores the actual holding and the court's analysis as well as the obvious distinctions between the different statutes, circumstances, legislative histories and congressional purposes involved. The decision does not in any way impact on the other statutes cited and none of the issues thus raised would be before this Court on review.

ARGUMENT

A. This Petition Raises No Special And Important Reasons For The Court To Exercise Its Discretion To Grant Certiorari.

Review of the decision in this matter by writ of certiorari is a matter solely within the Supreme Court's discre-

tion and a petition for writ of certiorari should be granted only upon a showing of a need for the Court to exercise its role as the ultimate arbiter of the nation's laws. Thus, certiorari should be granted only when the petition raises issues the resolution of which are of significant importance to the public as distinct from the parties. *Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70 (1955). As the court explained in the *Rice* opinion,

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants . . .
>
> 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Id. at 74 (citations omitted).

The court in *Rice* concluded its opinion with the following quote from Judge Taft:

> "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712."

Id. at 79.

These considerations are embodied in the Rules of the Supreme Court, Rule 17. That rule provides as follows:

"Rule 17. Considerations Governing Review on Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari."

The language of this rule governing the circumstances under which review by certiorari is appropriate has remained essentially unchanged for over 60 years. The principles which are embodied in it have guided the Court's exercise of its discretionary power of review in order to shape the body of Supreme Court decisions around those issues which impact on the development of national law and involve principles of significant public interest. Yet the Petitioner in this case has neither cited the rule nor pointed to a single "special and important reason" for granting certiorari, whether of the kind illustrated in the rule or otherwise. The reason for this omission is obvious; while the Ninth Circuit Court of Appeals' decision is of significant importance to Petitioner in that it prevents it from reaping the windfall described hereinabove, no issue of national importance is raised in that decision. The decision determines the manner of application of a time deadline to a minor procedural issue in federal bankruptcy practice. Simply put, the Court of Appeals has decided that a motion seeking an extension of time must be filed and cause for the extension must exist by a date certain but the bankruptcy court can decide the motion, within its normal procedures for controlling its calendar, after that date. Notwithstanding Petitioner's protestations, neither the consistent administration of federal bankruptcy law nor the foundations of statutory interpretation have been threatened by this result. Rather, the Ninth Circuit Court of Appeals adopted a rule of sufficient certainty to provide consistent administration of the law through an exercise of statutory construction well within the precedents of this court.

B. The Decision Below Raises No Conflict Between The Circuit Courts Of Appeal.

The decision below is the only decision yet issued by any of the Circuit Courts of Appeal on the issue of the interpretation of the provisions of 11 U.S.C. § 365(d)(4) concerning the time limitation for the filing and determination of a motion to extend the time to assume or reject a lease. Indeed, the Ninth Circuit Court of Appeals is also the only Circuit to address the closely related issue of the effect of the section on a motion to assume filed within sixty days but decided after the time limit. *In re Victoria Station, Inc.,* 840 F.2d 682 (9th Cir. 1988). Thus, there exists no conflict between the Circuits which would present a need for resolution by this Court in order to insure a uniform application of federal law.

Moreover, the only decision by any courts acting in an appellate capacity are consistent with the decision below. In *In re By-Rite Distributing, Inc.,* 55 Bankr. 740 (D. Utah 1985) District Judge Jenkins reviewed the holding of the bankruptcy court previously relied upon by the Bankruptcy Court in the present case. The district court's decision, which is consistent with *In re Victoria Station, Inc., supra,* held that 11 U.S.C. § 365(d)(4) did not require approval of a motion to assume a lease within sixty days from the commencement of the case if the motion was filed within that time. Similarly, in *Tigr Restaurant, Inc., v. Rouse S.I. Shopping Center, Inc.,* 79 Bankr. 954 (E.D. N.Y. 1987). District Judge Dearie acting in an appellate capacity, reversed the bankruptcy court and held that subsequent extensions of the time to assume or reject were allowed if motions were filed within the time of earlier, properly granted extensions.

Thus, every appellate court considering the section in question has interpreted it consistently with the decision

below to require a motion which is filed within sixty days to be decided by the bankruptcy court after that time. The only conflicting decisions are at the trial court level and certainly raise no issue of national importance to be resolved by this court. *See, Cleveland Board of Education v. La Fluer,* 414 U.S. 632, 638-639 n.8 (1974); *Ward v. Illinois,* 431 U.S. 767, 770-771; (1977); *Calhoon v. Harvey,* 379 U.S. 134 (1964).

C. The Decision Below Does Not Decide An Important Question Of Federal Law In A Manner Conflicting With The Prior Decisions Of This Court.

The Petitioner does not directly assert either that the Ninth Circuit's holding raises an undecided substantial issue of federal law which should be determined by this court or that it is in conflict with prior decisions of this court. Rather the asserted reasons for granting the Petition are to correct what Petitioner describes as the formulation of a supposedly new cannon of statutory construction which if applied to other provisions of the Bankruptcy Code not here at issue, will have a disruptive effect. However, neither of Petitioner's premises is viable.

The Ninth Circuit Court of Appeals followed long settled legal principles of interpretation in reaching its decision. The "slippery slope" of disrupted bankruptcy administration which Petitioner forsees is simply the untenable misinterpretation and misapplication of the principles upon which the lower court's decision was based.

The only conflict with this Court's decisions pointed out by Petitioner is a supposed disregard for the proper method of statutory construction. Petitioner's argument is that Congress' intent may be determined solely by reference to the language of the statute itself and that

reference to any extrinsic source, including legislative history, to determine that intent was improper. However, Petitioner's position in this regard is erroneous in two respects.

First, as the decision below points out, the statutory language is not free from ambiguity. It is susceptible to multiple meanings as a result of the placement and punctuation of the modifying clause "within such 60-day period." It is unclear simply from the statute's language whether the clause modifies the time period during which cause for extension must exist or the period within which the court must act, or both. If the first meaning were intended, it would have better been expresed by omitting the comma following the word "cause." If the second meaning is correct, the phrase would best be placed after the work "fixes." If the phrase was meant to condition both the existence of cause and the entry of the court's order, the word "fixes" would better have been placed after "court." In any event, while one can argue which of the available interpretations is "stronger", this is not a case where Petitioner's "plain meaning" rule could apply.

More importantly, this Court's prior decisions do not enunciate the strict literalist approach presented by Petitioner. Neither the cases cited in the Petition nor the balance of the vast body of Supreme Court precedent addressing statutory construction adopt a rule which precludes seeking the intent of Congress from sources other than the language of the specific code section at issue. Indeed, such a position has been specifically rejected by this Court. *Train v. Colorado Public Interest Research Group,* 426 U.S. 1 (1976). In that case the Ninth Circuit Court of Appeals, regarding the statutory lan-

guage as unambiguous, did not concern itself with legislative history. This Court reversed stating:

> "To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: 'When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' "

Id. at 9.

Indeed, in each of the cases relied upon by Petitioner, many of which were relied upon by the court below, the Supreme Court did review sources of legislative intent beyond the statutory language concluding from those materials that the congressional purpose was reflected in the language used. The cases cited do not stand for the proposition asserted by Petitioner that no such review is permitted. *See, e.g., INS v. Cardoza-Fonseca,* 107 S.Ct. 1207, 1213 n.12 (1987); *United States v. James,* 106 S.Ct. 3116, 3121 (1986); *Bethesda Hosp. Ass'n v. Bowen,* 108 S.Ct. 1255, 1259. Rather, the proper method of statutory analysis, which was the course followed by the Ninth Circuit Court of Appeals in this matter, was explained by the Court in *Watt v. Alaska,* 451 U.S. 259 (1981) as follows:

> "We agree with the Secretary that '[t]he starting point in every case involving construction of a statute is the language itself.' *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (POWELL, J. concurring). *See, Rubin v. United States,* 449 U.S. 424, 1010 S.Ct. 698, 66 L.Ed.2d 633 (1981). But ascertainment of the meaning apparent on the face of a single statute

need not end the inquiry. *Train v. Colorado Public Interest Research Group,* 426 U.S. 1, 10, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434 (1976); *United States v. American Trucking Assns., Inc.,* 310 U.S. 534, 543-544, 60 S.Ct. 1059, 1063-1064, 84 L.Ed. 1345 (1940). This is because the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' *Boston Sand Co. v. United States,* 278 U.S. 41, 48, 49 S.Ct. 52, 54, 73 L.Ed. 170 (1928) (Homes, J.). The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." E.g., *Church of the Holy Trinity v. United States,* 143 U.S. 457, 459, 36 L.Ed. 226 (1892); *United States v. Ryan,* 284 U.S. 167, 175, 52 S.Ct. 65, 68, 76 L.Ed. 224 (1931).

"Sole reliance on the 'plain language' of § 401(a) would assume the answer to the question at issue." *Id.* at 265. (footnote omitted)

The Supreme Court has held that a court has a duty to look beyond the language of a statute where a literal reading would produce absurd, unintended, or manifestly unjust results. In the case of *Rector, Etc., of Holy Trinity Church v. U.S.*, 143 U.S. 457, 460 (1892), the Supreme Court stated as follows:

"If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."

The Supreme Court went on to state as follows:

"[A]nother guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous

> events, the situation as it existed, and as it was pressed upon the attention of the legislative body." 143 U.S. at 513.

In the case of *U.S. v. American Trucking Assns.*, 310 U.S. 534, 542 (1940), the Supreme Court expanded upon the function of a court in construing statutory language where literal adherence would be absurd, futile, or unreasonable:

> "In the interpretation of statutes, the function of the courts is . . . to construe the language so as to give effect to the intent of Congress. . . . Often [the] words [of the statute] are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act . . . [*E*]*ven when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose rather than the literal words.*" *Id.* (emphasis in original.)

The Supreme Court reaffirmed the holdings of *Holy Trinity* and *American Trucking* in its decision in *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966), and those decisions have been consistently adhered to by courts when confronted by statutory language found to produce absurd, unintended or unreasonable results.

The Ninth Circuit Court of Appeals construction of 11 U.S.C. § 365(d)(4) in this case is consistent with the congressional intent in enacting the statute. *In re Unit Portions of Delaware, Inc.*, 53 Bankr. 83 (Bankr. E.D.N.Y. 1985); *In re Musikahn Corp.*, 57 Bankr. 938 (Bankr.

E.D.N.Y., 1986); *Tigr Restaurant, Inc. v. Rouse S.I. Shopping Center, Inc., supra.* The legislative history of Section 365(d)(4) indicates that the problem the section "would remedy is the long-term vacancy or partial operation of space by a bankruptcy tenant." 130 Cong. Rec. S-8894-95 (remarks of Senator Hatch) reprinted in U.S. Code Cong. & Admin. News 599 (1984). The section was designed to eliminate the extended period of uncertainty as to the debtor's intention which could exist under prior law and was originally directed at shopping center lease. Although expanded to all nonresidential leases, the section was not designed to provide landlords with protection from every adverse consequence of a tenant's bankruptcy. *See, In re By-Rite Distributing, Inc.*, 55 Bankr. 740 (Bankr. D. Utah 1985).

As the bankruptcy court in *In re Unit Portions of Delaware, Inc., supra*, stated:

> "By requiring the trustee to make a decision concerning the lease within the 60-day period, or show cause why he needs additional time to do so, the statute protects adverse parties against delays caused by the trustee's failure to investigate whether the lease should be assumed. *No possible statutory purpose is served by terminating the estate's interest in the lease merely because the court could not hear or decide the issue within the 60-day period.*
>
> "*A trustee who has requested a hearing for an extension of time within the prescribed period, and who makes a prima facie case of his need for the additional time has done all he can to obtain the extension. It would be absurd to deny his request and cause the estate to forfeit a potentially critical asset merely because the trustee's motion was not decided until after the expiration of the 60-day period. The*

> *court finds no evidence in the legislative history or in the overall statutory scheme to indicate Congress intended such a result.*" 53 Bankr. at 85 (emphasis added, citations omitted).

The conclusion reached by the court in *Unit Portions of Delaware, Inc., supra,* was agreed with by the United States District Court for the District of Utah in its decision reversing the Bankruptcy Court decision primarily relied upon by the City, and the Bankruptcy Court in this case. The District Court in *In re By-Rite Distributing, Inc., supra,* held as follows:

> "The bankruptcy court's interpretation of section 365(d)(4) would actually defeat the stated legislative intent by giving the trustee *less* than the full sixty days to make up his mind. If the trustee has to get court approval within the sixty days, he would have to decide whether or not to assume the lease and file his motion for assumption much earlier, to allow time for the required notice, the filing of any objections and the required hearing. *See* Bankruptcy Rule 6006. In complex cases especially, such a requirement would unduly tax the trustee, who must also calculate assets and debts, determine creditors and file schedules soon after the filing of the petition. The result would likely be that trustees would routinely file for extensions of the sixty-day period, leading to the very evil that section 365(d)(4) was meant to cure — costly delay." 55 Bankr. at 745 (emphasis in original).

See also, In re Burns Fabricating Co., 61 Bankr. 955 (Bankr. E.D. Mich. 1986).

While petitioner might wish congressional intent to have been to provide lessors with every protection con-

ceivable, the scope of Section 365(d)(4) is not so broad. As the court below recognized, the section's intent was to provide certainty to the relationship between landlords and tenants in bankruptcy cases, while preserving the estate's ability to demonstrate a need for additional time to assume valuable leasehold interests which might be crucial to a reorganization. The decision of the Ninth Circuit Court of Appeals properly ascertained and implemented that intent.

D. Rather Than Disrupt The Bankruptcy System, The Decision Of The Lower Court Will Promote Administration Of Cases Consistent With Congressional Intent.

Petitioner, apparently in an effort to elevate to a level of national importance a dispute actually concerning the purely procedural issue of the scheduling of hearings, raises the specters of increased uncertainty for lessors and a host of as yet unvisited evils in other areas of bankruptcy law unrelated to the present case. The petitioner's arguments in this regard misconstrue the decision below in order to create uncertainties where none exist and attribute to the lower courts an unfounded predilection toward destructiveness not evident in this or other decisions. The parade of horribles predicted by petitioner are neither mandated by the holding of the decision sought to be reviewed nor are they foreseeable based upon the lower court's analysis.

With respect to the decision's actual holding that the bankruptcy court may determine a motion for an extention filed within sixty days of the commencement of the case after the expiration of that time, petitioner asserts that the congressional purpose of providing certainty for landlords is frustrated because "any debtor or trustee

who misses or miscalculates one of these time limits may seek to avoid the consequences of its own inaction." Petition, p. 18. However, the Ninth Circuit Court of Appeals' holding does not create any such risk. The opinion requires the motion to be served and filed within the sixty day period. Thus, the landlord must receive notice of the debtor's or trustee's intention within the sixty day time frame as Congress envisioned. In the unlikely event that the hearing on the motion is unduly delayed by the debtor, the Ninth Circuit Court of Appeal's decision, at worst, shifts the obligation to advance the hearing date to the landlord. However, the notice procedure adopted is precisely analogous to the legislative history accompanying the enactment of the section and to that of prior versions recited at page 14 of the Petition. The landlord will receive notice within the first sixty days of the trustee's or debtor's intentions.

The supposed impact of the decision on Sections 108, 362 and 1124 of the Bankruptcy Code, 11 U.S.C. §§ 108, 362 and 1124, is simply specious. The decision has no impact on those sections whatsoever. The statutory language, legislative history and related statutory framework are entirely distinct from that considered below. Those sections were enacted as a part of the original Bankruptcy Reform Act of 1978, not the Bankruptcy Amendments and Federal Judgeship Act of 1984 and reflect entirely distinct statutory language, legislative purposes and goals. Petitioner's attempt to read the decision below as affecting these sections is simply an attempt to distort the decision's scope beyond any warranted by the pertinent facts, the lower court's holding or the language used in order to magnify the decisions supposed impact and thus the importance of review. This effort should be rejected.

CONCLUSION

The petition demonstrates no special and important reasons for granting review by certiorari in this case. The issue of the scheduling of hearings on motions to extend the time to assume or reject leases in bankruptcy cases is not inherently of national importance and there is no conflict among the circuits.

Moreover, the Ninth Circuit Court of Appeals neither adopted a new method of statutory construction in the abstract nor did it apply existing precedent erroneously. Rather, it properly ascertained Congressional intent and adopted a rule effectuating that intent. The decision below provides a rule of certainty and fairness which requires no further review. Therefore, the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed on behalf of the City of Long Beach should be denied.

DATED: May 26, 1988

Respectfully submitted,

RICHARD K. DIAMOND*
DANNING, GILL, GOULD, DIAMOND & SPECTOR

By RICHARD K. DIAMOND
Attorneys for Respondent

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* Counsel of Record.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On May 26, 1988, I served the within Opposition To Petition for Writ of Certiorari in re: "City of Long Beach vs. Southwest Aircraft Services, Inc." in the United States Supreme Court, October Term 1987, No. 87-1987;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on May 26, 1988, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA